*** HON'BLE SRI G.S. SINGHVI, THE CHIEF JUSTICE**

+ W.P.NO.8213 of 1994

% Dated 14.11.2006

 # G.V. Triveni Prasad

....

PETITIONER

Vs.

$ Syndicate Bank,
rep. by its Chairman-cum-Managing Director,
Manipal, Karnataka State & others

.... RESPONDENTS

! Counsel for the Petitioner : Sri V.V. Sivarama Prasad

^ Counsel for the Respondents: Ms. V. Uma Devi

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> HEAD NOTE:

? Cases referred

1) **AIR 1986 SC 1955**
2) **1995 Supp. (4) SCC 169**
3) **(1993) 4 SCC 357**
4) **(2003) 4 SCC 104**
5) **(2004) 4 SCC 245**
6) **(2004) 12 SCC 299**
7) **AIR 1963 SC 779**
8) **AIR 1963 SC 1723**
9) **AIR 1969 SC 966**
10) **AIR 1965 SC 1103**

11)AIR 1975 SC 2151
12)(1995) 6 SCC 749
13)(1999) 1 SCC 759
14)(1969) 3 SCC 392
15)(1976) 3 SCC 574
16)(1980) 3 SCC 304
17)(1984) 1 SCC 43
18)(1984) 3 SCC 295
19)(1986) 3 SCC 299
20)(1987) Suppl. SCC 518
21)(1993) 4 SCC 727
22)(1994) 4 SCC 422
23)(1996) 3 SCC 364
24)(1996) 6 SCC 415
25)(1998) 6 SCC 651
26)(1999) SCC (L & S) 620
27)(2001) 6 SCC 392
28)(2003) 11 SCC 734
29)(2003) 3 SCC 443
30)(2004) 1 SCC 281
31)(2005) 2 SCC 237
32)(1987) 4 SCC 611
33)(1997) 7 SCC 463
34)(2001) 2 SCC 386
35)(1995) 6 SCC 749
36)(2003) 3 SCC 605
37)(2003) 4 SCC 331
38)(2005) 7 SCC 338
39)(2006) 1 SCC 589
40)(2006) 3 SCC 173
41)(2006) 3 SCC 276
42)(2006) 5 SCC 137
43)(2006) 7 SCC 410
44)(1990) 4 SCC 594

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HON'BLE SHRI G.S.SINGHVI, THE CHIEF JUSTICE

WRIT PETITION No. 8213 OF 1994

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Between:

G.V. Triveni Prasad

..... Petitioner

AND

Syndicate Bank,
Rep. by its Chairman-cum-Managing Director,
Manipal, Karnataka State & others

.....Respondents

:: O R D E R ::

Counsel for the petitioner : Shri V.V. Sivarama Prasad

For Shri T. Anil Kumar

Counsel for the respondents : Ms. V. Uma Devi for Shri K. Srinivasa Murthy

Dated: 14.11.2006

Transfer is not a condition of service, but is merely an incidence of service. An employee, who joins service of an employer having establishments or offices all over India, can be posted in any part of the country and he cannot be heard to complain against transfer from one place to the other. If he fails to comply with or disobeys the order of transfer/posting, he does so at his own peril. Ordinarily, the Court will not interfere with the employer's prerogative to transfer and post an employee from one place or station to the other unless it is established that the action of the employer is contrary to the statutory provisions or is vitiated due to patent arbitrariness or mala fides. This proposition must be treated as settled by the judgments of the Supreme Court in **B. Varadha Rao v. State of Karnataka**[1], **Abani Kanta Ray v. State of Orissa**[2], **Union of India v. S.L. Abbas**[3], **Public Services Tribunal Bar Association v. State of U.P.**[4], **Union of India v. Janardhan Debanath**[5] and **Kendriya Vidyala**

Sangathan v. Damodar Prasad Pandey[6].

I have prefaced disposal of this petition by taking cognizance of the above noted proposition because the questions, which arise for determination in this petition filed under Article 226 of the Constitution of India, are whether the petitioner was justified in not carrying out the order of transfer and whether the penalty of removal from service imposed on him on the proved charge of disobedience of the order of transfer and unauthorized absence from duty is legally correct and justified.

The Facts:

While he was holding the post of Assistant Manager in the employment of Syndicate Bank (for short, 'the bank') and was posted at Patterghatti Branch at Hyderabad, the petitioner was transferred to Pune Branch vide order dated 07.04.1988 passed by the competent authority. He did not join at Pune. Instead, he submitted representation dated 10.04.1988 with the request that he may be posted either at Bombay or Calcutta. After sometime, he filed Writ Petition No.6980 of 1988 for quashing the order of transfer and succeeded in persuading the learned Single Judge to stay his transfer. The efforts made by the bank for getting the ex parte interim order vacated failed because the miscellaneous petition filed on its behalf of the bank was dismissed by the learned Single Judge. However, on appeal, which was registered as Writ Appeal No.1383 of 1989, the Division Bench reversed the order of the learned Single Judge and vacated the stay order. Thereafter, the competent authority, vide its order dated 28.10.1989 posted the petitioner at Meerut Branch of the bank. He

did not carry out the second order of transfer as well and made representation for cancellation of the same by citing the cold weather at Meerut as the reason. The management of the bank did not accede to his request. The petitioner then adopted the usual tactics, which the employees transferred from one place to the other adopt. He submitted application dated 23.11.1989 for grant of sick leave. This was followed by an application for grant of privilege leave for 45 days with effect from 21.01.1990. Later on, he sought extension of leave by 60 days by citing his ill-health and sudden demise of father-in-law as the grounds. On 20.08.1990, he again applied for privilege leave on medical grounds from 07.05.1990 to 31.10.1990. The management of the bank did not accept either of the applications and issued notice dated 10.09.190 to the petitioner requiring him to explain as to why he had not carried out the order of transfer despite the fact that he had been relieved from Patterghatti Branch on 18.11.1989. In his reply dated 19.09.1990, the petitioner pleaded ignorance about the relieving order and claimed that he cannot be charged with the allegation of remaining absent from duty. The recalcitrant attitude adopted by the petitioner in not carrying out the order of transfer compelled the management of the bank to initiate action under the Syndicate Bank Officer Employees' (Conduct) Regulations, 1976 (for short, 'the Conduct Regulations') read with Syndicate Bank Officer Employees' (Discipline & Appeal) Regulations, 1976 (for short 'the Discipline and Appeal Regulations). A regular departmental enquiry was instituted against him vide Memo dated 12.03.1991. The charges leveled against the petitioner were as

follows:

> **"I. <u>Articles of Charge No.I:</u>**
>
> That while he was working as AMID at Pathergatty Branch he was issued with a Transfer Order bearing Ref.No.80/ZO/PSOW/ STO/288635 dated 28.10.1989 transferring him to Meerut Main Branch. Thereafter, he was relieved from Pathergatty Branch on 18.11.1989 to enable him to report at our Meerut Main Branch. Since he failed to carry out the orders of the Bank, his higher authorities at Zonal Office, Hyderabad instructed him again to report for duty at Meerut Main Branch immediately. In spite of the same, he had failed to report for duty at Meerut Main Branch and to carry out the lawful and reasonable orders of the Bank till date. Thereby Sri G.V. Triveni Prasad acted in a manner prejudicial to the interest of the Bank and unbecoming of the status of a Bank Officer.
>
> By his above acts, he had violated Regulation No.3(1) read with Regulation No.24 of Syndicate Bank Officer Employees' (Conduct) Regulations 1976.
>
> **II. <u>Articles of Charge No.II:</u>**
>
> That Sri G.V. Triveni Prasad continued to remain absent from the duties unauthorisedly and without the permission/prior sanction from the Competent Authorities during the period from 19.11.1989 till date.
>
> That by his above acts, he had contravened Regulation No.13(1) read with Regulation 24 of Syndicate Bank Officer Employees' (Conduct) Regulations 1976."

The petitioner filed reply and denied the charges. After considering the same, the competent authority appointed Shri P.S. Nayak, Deputy Personnel Manager, I.R. Division (O), Head Office, Manipal was appointed as the Enquiry Officer. Subsequently, Shri K. Ramachandra Bhat of the Vigilence Cell, Hyderabad was appointed as Enquiry Officer. Shri Bhat

submitted report dated 06.08.1992 with the finding that both the charges levelled against the delinquent have been proved. A copy of the enquiry report was forwarded to the petitioner and he was given opportunity to make representation against the same. In his reply dated 22.09.1992, the petitioner pleaded that he had no intention to disobey the order of transfer and that on account of his ill-health, he had represented for cancellation of transfer. He also pleaded that the applications made by him for grant of leave had not been rejected and, therefore, the leave will be deemed to have been sanctioned. After considering his representation, Assistant General Manager-cum-Disciplinary Authority passed order dated 06.01.1993, whereby the petitioner was removed from service. The appeal preferred by the petitioner was rejected by General Manager (Personnel) (hereinafter described as 'the Appellate Authority') vide his order dated 31.03.1993.

The petitioner has questioned the punishment of removal from service on the grounds that the findings recorded by the Enquiry Officer on the two charges are based on surmises and conjectures; that he never intended to disobey the order of transfer; that he had prayed for cancellation of transfer on the ground of ill-health, and that he cannot be punished on the charge of unauthorised absence from duty because the applications made by him for grant of leave had not been rejected by the competent authority.

The case set up by the bank is that the petitioner did not join at Meerut Branch despite the fact that he was relieved from

Pathergatti Branch on 18.11.1989; that leave applied by him was not sanctioned by the competent authority; that as per Clause 13(1) of the Conduct Regulations, no officer/employee can remain absent from duty without obtaining prior permission from the competent authority and only in case of emergency, the employee can seek post leave permission. In the counter affidavit filed on behalf of the bank, Shri Vasudevan, Deputy General Manager has averred that the petitioner's absence was treated as unauthorised because he did not seek permission of the competent authority for availing privilege leave from 21.01.1990. It is also the case of the respondents that even though the petitioner was informed about his transfer, he did not bother to join duty at Meerut Branch and this constituted grave misconduct.

Shri V.V. Sivarama Prasad made dispassionate appeal to the Court to nullify the order of punishment as well as the order passed by the Appellate Authority by arguing that the charge of unauthorized absence levelled against the petitioner was totally unwarranted. He submitted that the management of the bank never denied receipt of the applications made by the petitioner for grant/ extension of leave from time to time and, therefore, he cannot be accused of having deliberately absented from duty. Learned counsel further argued that if the finding recorded by the Enquiry Officer in respect of charge No.2 is held to be vitiated, the penalty of removal from service is liable to be quashed because the petitioner's failure to carry out the order of transfer did not constitute a serious misconduct. Learned counsel then invoked the doctrine of proportionality and argued that the Court may

substitute the penalty of removal from service with a lesser penalty so that the petitioner can earn pension and other retiral benefits. Learned counsel also assailed the appellate order by arguing that the same does not satisfy the test of a 'speaking order'.

Ms.V. Uma Devi, learned counsel for the respondents submitted that the petitioner's failure to join at the transferred place constituted serious misconduct and no illegality was committed by the management of the bank by imposing the penalty of removal from service. She further argued that the petitioner was punished, after holding enquiry in accordance with the provisions of the Discipline and Appeal Regulations and there is no warrant for judicial interdiction in such matters by invoking the doctrine of proportionality because the petitioner has failed to show that his cause was prejudiced on account of any legal infirmity in the action taken by the bank. Lastly, she argued that the Appellate Authority had considered all the points raised by the petitioner and, therefore, order dated 31.03.1993 cannot be castigated as non-speaking.

I have thoughtfully considered the entire matter. It is not in dispute that the petitioner did not carry out transfer orders dated 07.04.1988 and 28.10.1989 vide which he was posted at Pune Branch in the first instance and then at Meerut Branch. His failure to comply with the first order acquired legitimacy because, while issuing notice in Writ Petition No.6980 of 1988, a learned Single Judge of this Court stayed the implementation of order dated 07.04.1988. The interim order

passed by the learned Single Judge subsisted till 27-9-1989 when the writ appeal preferred by the bank was allowed. After the decision of the writ appeal, the petitioner was transferred and posted at Meerut Branch of the bank. He again disobeyed the order of transfer and applied for grant of sick leave, which was sought to be extended by grant of privilege leave. The management of the bank did not entertain his request and initiated disciplinary proceedings vide charge sheet dated 12.03.1991. The same culminated in the passing of order dated 06.01.1993. A careful reading of that order shows that the disciplinary authority had made threadbare analysis of the evidence produced during the enquiry, considered the defence of the petitioner and then concluded that the charges leveled against him are proved. Learned counsel for the petitioner could not point out any infirmity in the appreciation of evidence made by the disciplinary authority. Therefore, the petitioner's challenge to the order of punishment on the ground that the findings and conclusions recorded by the Enquiry Officer and the disciplinary authority are based on conjectures and surmises is liable to be negatived.

The scope of judicial review of the disciplinary action taken by the employer is extremely limited. The Court can interfere with the punishment imposed on the employee only if it is shown that the action of the employer is vitiated due to violation of the statutory rules or regulations or the principles of natural justice and such violation has prejudiced his cause. The Court cannot sit in appeal over the findings recorded by the Enquiry Officer and/or disciplinary authority except when it is convinced that the finding

is perverse.

In **State of Orissa v. Bidyabhushan Mohapatra**[7], the Supreme Court considered whether the High Court can interfere with the order of punishment simply because finding recorded by the enquiry officer in respect of some charges is found to be vitiated by an error of law and whether it can go into the sufficiency and adequacy of punishment. While reversing the order of Orissa High Court, which had allowed the writ petition filed by the respondent, their Lordships of the Supreme Court observed:

> "But the Court in a case in which an order of dismissal of a public servant is impugned is not concerned to decide whether the sentence imposed, provided it is justified by the rules, is appropriate having regard to the gravity of the misdemeanour established. The reasons which induce the punishing authority, if there has been an inquiry consistent with the prescribed rules, are not justiciable: nor is the penalty open to review by the Court. If the High Court is satisfied that if some but not all of the findings of the Tribunal were 'unassailable', the order of the Governor on whose powers by the rules no restrictions in determining the appropriate punishment are placed, was final, and the High Court had no jurisdiction to direct the Governor to review the penalty for as we have already observed the order of dismissal passed by a competent authority on a public servant, if the conditions of the constitutional protection have been complied with, is not justiciable. Therefore if the order may be supported on any finding as to substantial misdemeanour for which the punishment can lawfully be imposed, it is not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. The Court has no jurisdiction if the findings of the inquiry officer or the Tribunal prima facie make out a case of misdemeanour, to direct the

authority to reconsider that order because in respect of some of the findings but not all it appears that there had been violation of the rules of natural justice."

In **State of A.P. v. Sree Rama Rao**[8], the Supreme Court indirectly reiterated the proposition laid down in **Bidyabhushan Mohapatra**[5] (supra) and held**:**

"The High Court is not constituted in a proceeding under Article 226 of the Constitution a court of appeal over the decision of the authorities holding a departmental inquiry against a public servant; it is concerned to determine whether the inquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the inquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of inquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the inquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which the findings

can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding ... under Article 226 of the Constitution."

In **Rly. Board v. Niranjan Singh**[9], the principle laid down in **Bidyabhushan Mohapatra**[5] (supra) was reiterated. In **State of Madras v. G. Sundaram**[10], the Constitution Bench of the Supreme Court laid down the following proposition:

"High Court, in the exercise of its jurisdiction under Article 226 of the Constitution, cannot sit in appeal over the findings of fact recorded by a competent Tribunal in a properly conducted departmental enquiry except when it be shown that the impugned findings were not supported by any evidence. It cannot consider adequacy of that evidence to sustain the charge."

In **State of A.P. v. C. Venkata Rao**[11], a three Judges Bench of the Supreme Court referred to the judgments of **Syed Yakoob**[1] (supra), **Bidyabhushan Mohapatra**[5] (supra), **Niranjan Singh**[7] (supra) and observed:

"In considering whether a public officer is guilty of misconduct charged against him, the rule followed in criminal trials that an offence is not established unless proved by evidence beyond reasonable doubt to the satisfaction of the Court need not be applied. Even if that rule is not applied by a domestic tribunal in any inquiry the High Court in a petition under Article 226 of the Constitution is not competent to declare the order of the authorities holding a departmental enquiry invalid. The High Court is not a court of appeal under Article 226 over the decision of the authorities holding a departmental enquiry against a public

servant. The Court is concerned to determine whether the enquiry is held by an authority competent in that behalf and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court to review the evidence and to arrive at an independent finding on the evidence. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal."

In **B.C. Chaturvedi v. Union of India**[12], the Supreme Court, while considering the appellant's challenge to the order of punishment passed as a sequel to the departmental enquiry held against him, highlighted the limited scope of judicial review by making the following observations:

"Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are

complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to re-appreciate the evidence or the nature of punishment. The Court/Tribunal in its power of judicial review does not act as appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of that case."

In **Apparel Export Promotion Council v. A.K. Chopra**[13], the Supreme Court again considered the High Court's power to interfere with the disciplinary proceedings and held:

"It is a settled position that in departmental proceedings, the disciplinary authority is the sole judge of facts and in case an appeal is presented to the appellate authority, the appellate authority has also the power/and jurisdiction to reappreciate the evidence and come to its own conclusion, on facts, being the

sole fact-finding authorities. Once findings of fact, based on appreciation of evidence are recorded, the High Court in writ jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based either on *no evidence* or that the findings were wholly perverse and/or legally untenable. The adequacy or inadequacy of the evidence is not permitted to be canvassed before the High Court. Since the High Court does not sit as an appellate authority over the factual findings recorded during departmental proceedings, while exercising the power of judicial review, the High Court cannot, normally speaking, substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities. Even insofar as imposition of penalty or punishment is concerned, unless the punishment or penalty imposed by the disciplinary or the departmental appellate authority, is either impermissible or such that it shocks the conscience of the High Court, it should not normally substitute its own opinion and impose some other punishment or penalty.

Further, it is a well-settled principle that even though judicial review of administrative action must remain flexible and its dimension not closed, yet the court, in exercise of the power of judicial review, is *not* concerned with the *correctness* of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence and have been arrived at through proceedings which cannot be faulted with for procedural illegalities or irregularities which vitiate the process by which the decision was arrived at. Judicial review, it must be remembered, is directed not against the decision, but is confined to the examination of the decision-making process.

Judicial review, not being an appeal from a decision, but a review of the manner in which the decision was arrived at, the court, while exercising the power of judicial review, must remain conscious of the fact that if the decision has been arrived at by the administrative authority after following the principles established by law and the rules of natural justice

and the individual has received a fair treatment to meet the case against him, the court cannot substitute its judgment for that of the administrative authority on a matter which fell squarely within the sphere of jurisdiction of that authority."

The argument of Shri V.V. Sivarama Prasad that the second charge cannot be held as proved against the petitioner because the competent authority did not reject the applications submitted by the petitioner is being mentioned by me only to be rejected. Clause 13 of the Conduct Regulations clearly lays down that an employee availing privilege leave must seek prior permission of the competent authority except in the case of emergency. It is neither the pleaded case of the petitioner nor any material has been produced before the Court to show that he had to proceed on leave due to some emergency. Therefore, in terms of Clause 13 of the Conduct Regulations, he was duty bound to take prior permission of the competent authority. However, the fact of the matter is that immediately after being relieved from Pathergatti Branch, the petitioner applied for sick leave and then for privilege leave and never bothered to report for duty at Meerut. At no point of time, he applied for extension of time to join duty. Instead, he voluntarily abstained from duty. The background in which the petitioner was transferred to Meerut Branch of the bank and the obstinate attitude adopted by him in disobeying the order of transfer leaves no manner of doubt that his applications for leave were a part of ploy to avoid the execution of the transfer order. Therefore, the finding recorded by the disciplinary authority that the petitioner remained unauthorisedly absent from duty cannot be faulted.

I am further of the view that even if the Court was to presume that the charge of unauthorised absence from duty had not been levelled against the petitioner or the said charge is treated as not proved, the penalty of removal from service imposed on him does not call for interference under Article 226 of the Constitution. In **Gujarat Electricity Board v. Atmaram** (supra), the Supreme Court considered a case akin to that of the petitioner, interpreted the service regulations applicable to the employees of Gujarat State Electricity Board and held:

> "1) Transfer of a government servant appointed to a particular cadre of transferable posts from one place to the other is an incident of service. No government servant or employee of Public Undertaking has legal right for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance with the transfer order, he would expose himself to disciplinary action under the relevant rules, as has happened in the instant case.
>
> 2) No government servant or employee of any

public undertaking has a right to be absent from duty without sanction of leave merely on account of pendency of representation against the order of transfer. Regulation 113 of the Service Regulations contemplates that before exercising power thereunder for summarily discharging an employee from the service of the Gujarat State Electricity Board without complying with the procedure prescribed for taking disciplinary action, two conditions must be satisfied; firstly, the employee must be found to be absent from duty without leave or overstaying the period of sanctioned leave, and, secondly, he failed to join his duty even after a warning. The object and purpose of giving warning is to remind the delinquent employee that if he continues to be absent from duty, he would be liable to action under Regulation 113 and to afford him an opportunity to make amends by joining his duty. If even thereafter he fails to join duty, his services are liable to be terminated by an order of discharge. A warning need not be in any particular form."

If the petitioner's case is considered in the light of the above judgment, it is impossible to agree with Shri V.V.Sivarama Prasad that non-compliance of the order of transfer did not warrant imposition of the penalty of removal from service. At the cost of repetition, I deem it proper to observe that the misconduct found proved against the petitioner was of extremely grave character. He was an officer of the bank and was holding responsible position. Therefore, the misconduct committed by him i.e., persistent disobedience of the order of transfer and continued absence from duty had to be viewed very seriously and the management of the bank cannot be accused of having acted arbitrarily when the penalty of removal from service was imposed on him. Any lenience in such matters will have great adverse

impact on the entire establishment. It will spread the virus of indiscipline and would encourage other employees to indulge in similar acts of misconduct.

There is another reason for my disinclination to interfere with the action taken by the management of the bank. The petitioner has neither pleaded nor any evidence has been produced before the Court to show that his cause was prejudiced on account of violation of the Conduct Regulations read with the Discipline and Appeal Regulations or the principles of natural justice. Indeed, it is not even the argument of Shri V.V. Sivarama Prasad that the petitioner had not been given effective opportunity of hearing. Therefore, there is no valid ground to interfere with the discretion exercised by the employer to impose the penalty of removal from service on the petitioner. In Sixties, Seventies and Eighties, the Courts insisted on rigorous compliance of the rule of hearing and the action taken by the employer against delinquent employee used to be invalidated on the ground of violation of the rule of hearing simplicitor and the theory of empty formality used to be rejected on the premise that prejudice should be presumed in the cases involving violation of the rules of natural justice. This trend has perceptibly changed and the judicial precedents of last fifteen years give a clear indication of the shift. Now, the Courts do not invalidate the action taken by the employer to punish the delinquent employee only on the ground of violation of the rules of natural justice or violation of the procedure laid down by the rules, unless it is shown that such violation has prejudiced the defence/cause of the employee. In this connection, reference can

usefully be made to the judgments of the Supreme Court in **Janki Nath Sarangi v. State of Orissa**[14]; **R.C.Sharma v. Union of India**[15]; **Sunil Kumar Banerjee v. State of West Bengal**[16]; **K.N. Tripathi v. State Bank of India**[17]; **Mumtaz Hussein Ansari v. State of U.P.**[18]; **Kashinath Dikshita v. Union of India**[19]; **Chandrama Tiwari v. Union of India**[20]; **Managing Director, ECIL v. B. Karunakar**[21]; **Krishanlal v. State of Jammu and Kashmir**[22]**; State Bank of Patiala v. S.K. Sharma**[23]**, S.K. Singh v.Central Bank of India**[24]; **State of Uttar Pradesh v. Shatrughanlal**[25]; **Food Corporation of India v. Padamkumar Bhuvan**[26]; **State of Uttar Pradesh v. Harendra Arora**[27]; **Oriental Insurance Company v. S. Balakrishnan**[28]; **State of Uttar Pradesh v. Rameshchand Manglik**[29]; **Indra Bhanu Gaur v. Committee, Management of M.M Degree College** [30] and **Divisional Manager, Plantation Division A and N Islands v. Munnu Barrick**[31].

The doctrine of proportionality invoked by Shri V.V. Sivarama Prasad is also not available to the petitioner for seeking modification or substitution of the penalty of removal from service because the charges found proved against the petitioner are extremely grave. At the cost of repetition, it deserves to be mentioned that the petitioner was holding an important and

responsible position in the organization. He not only failed to carry out the orders of transfer, but continued to remain unauthorisedly absent for a period of one year and four months. Thus, his conduct was totally unbecoming of an officer of the bank. Therefore, the penalty of removal from service cannot be described as shockingly disproportionate or wholly unreasonable.

The Court's power to interfere with the punishment imposed on the delinquent employee has become subject matter of scrutiny in large number of cases. The terms and phrases like arbitrary, unreasonable, unconscionable and shockingly disproportionate are often used by the advocates representing the delinquent employees who seek intervention of the Court for invalidation of the order of punishment. The doctrine of proportionality and Wednesbury rule have also been pressed into service for persuading the Courts to interfere with the employers' prerogative to punish the employee. But, the courts have to constantly remain guard against adopting a populist approach in such matters and refrain from interfering with the punishment imposed by the employer on a delinquent employee. The power of judicial review in such cases should be exercised with great care and circumspection. Only in exceptional cases, the Court may interfere with the punishment, if it is convinced that the same is wholly arbitrary or shockingly disproportionate to the misconduct found proved. For determining this, the Court has to take into consideration the factors like length of service of the delinquent, the nature of duties assigned to him, sensitive nature of his posting and job requirement, performance norms, if any laid down

by the employer, the nature of charges found proved, the past conduct of the employee and the punishment, if any, imposed earlier. The Court has also to keep in mind the paramount requirement of maintaining discipline in the services and the larger public interest.

In **Ranjit Thakur v. Union of India**[32], the Supreme Court invoked the doctrine of proportionality for quashing the order of punishment because the same was found to be shockingly disproportionate to the misconduct found proved against the appellant. The proposition laid down in that case reads as under:

> "Judicial review generally speaking, is not directed against a decision, but is directed against the "decision-making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review."

In **Union of India v. G.Ganayutham**[33], the doctrine of proportionality was considered along with Wednesbury rule and the following propositions were laid down:

> "(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be

applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational – in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU principles.

(3) (a) As per Bugdaycay, Brind and Smith as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3) (b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4) (a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The

secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of "proportionality" and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14."

In **Om Kumar v. Union of India**[34], the Supreme Court considered the applicability of the doctrine of 'Proportionality' in the context of Article 14 of the Constitution, referred to the judgments in **Ranjit Thakur v. Union of India** (supra), **B.C. Chaturvedi v. Union of India**[35] and held**:**

"1) In this context, we shall only refer to these cases. In **Ranjit Thakur v. Union of India** this Court referred to "proportionality" in the quantum of punishment but the Court observed that the punishment was "shockingly" disproportionate to the misconduct proved. In **B.C. Chaturvedi v. Union of India** this Court stated that the court will not interfere unless the punishment awarded was one which shocked the conscience of the court. Even then, the court would remit the matter back to the authority and would nor normally substitute one punishment for the other. However, in rare situations, the court could award an alternative penalty. It was also so stated in **Ganayutham**."

2) Thus, from the above principles and decided cases, it must be held that where an administrative decision relating

to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment."

In **Regional Manager, U.P. SRTC v. Hoti Lal**[36], the Supreme Court outlined the mode to be adopted for determining whether the punishment imposed by the disciplinary authority is shockingly disproportionate and observed as under:

> "The Court or tribunal while dealing with the quantum of punishment has to record reasons as to why it is felt that the punishment was not commensurate with the proved charges. The scope for interference is very limited and restricted to exceptional cases. In the impugned order of the High Court no reasons whatsoever have been indicated as to why the punishment was considered disproportionate. Failure to give reasons amounts to denial of justice. A mere statement that it is disproportionate would not suffice. It is not only the amount involved by the mental set-up, the type of duty performed and similar relevant circumstances which go into the decision-making process while considering whether the punishment is proportionate or disproportionate. If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning, it would not be proper to

deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts in a fiduciary capacity, the highest degree of integrity and trustworthiness is a must and unexceptional." (underlining is ours)

In **Director General, RPF v. Ch. Sai Babu**[37], the Supreme Court reiterated that the High Court should not ordinarily interfere with the discretion exercised by the disciplinary authority in the matter of imposition of punishment and observed:

> "Normally, the punishment imposed by a disciplinary authority should not be disturbed by the High Court or a tribunal except in appropriate cases that too only after reaching a conclusion that the punishment imposed is grossly or shockingly disproportionate, after examining all the relevant factors including the nature of the charges proved, the past conduct, penalty imposed earlier, the nature of duties assigned having due regard to their sensitiveness, exactness expected and discipline required to be maintained, and the department/establishment in which the delinquent person concerned works."

In **V. Ramana v. A.P. SRTC**[38], the Supreme Court approved the view expressed by the Full Bench of this Court in the matter of imposition of punishment and observed:

> "The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in **Wednesbury case {(1948) 1 KB 223}** the court would not

go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision for that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision."

In **State of Rajasthan v. Mohd. Ayub Naz**[39], the Supreme Court reversed the order of Rajasthan High Court and upheld the punishment of dismissal from service imposed on the respondent on the charge of remaining absent from service without intimation. In paragarah 9 of the judgment, the Supreme Court observed:

"**9.** Absenteeism from office for a prolonged period of time without prior permission by government servants has become a principal cause of indiscipline which has greatly affected various government services. In order to mitigate the rampant absenteeism and wilful absence from service without intimation to the Government, the Government of Rajasthan inserted Rule 86(3) in the Rajasthan Service Rules which contemplated that if a government servant remains wilfully absent for a period exceeding one month and if the charge of wilful absence from duty is proved against him, he may be removed from service. In the instant case, opportunity was given to the respondent to contest the disciplinary proceedings. He also attended the enquiry. After going through the records, the learned Single Judge held that the admitted fact of absence was borne out from the record and that the respondent himself had admitted that he was absent for about 3 years. After holding so, the learned Single Judge committed a grave error that the respondent can be deemed to have retired after rendering of service of 20 years with all retiral benefits which may be available to him. In our opinion, the impugned order of removal from service is the only proper punishment to be awarded to the

respondent herein who was wilfully absent for 3 years without intimation to the Government. The facts and circumstances and the admission made by the respondent would clearly go to show that Rule 86(3) of the Rajasthan Service Rules is proved against him and, therefore, he may be removed from service.

In **Commr. of Police v. Syed Hussain**[40], the Supreme Court reversed the judgment of the Division Bench of this Court, which had quashed the order of punishment and remitted the case to the disciplinary authority for fresh consideration with the rider that the officer concerned may impose appropriate punishment except dismissal, removal or compulsory retirement. While setting aside the High Court's order, the Supreme Court observed:

> "The respondent herein was a Constable. He was to uphold the rule of law. It was his duty to aid the prosecution in getting the guilty punished. It was not his duty to aid or abet the accused in fleeing from justice. The accused in question Ahmed Qureshi, in view of the finding of fact arrived at by the disciplinary authority, was a hardened criminal. He had been involved in a series of snatching cases. Not only that, the respondent was also helping other accused persons in obtaining bail from the courts. It has been pointed out that in the case in which the respondent stood surety for the said Ahmed Qureshi, he had jumped bail. Presumably because the respondent a Constable had stood as his surety, he was enlarged on bail by the court.
>
> In a situation of this nature, keeping in view the nature of duties that a protector of law is required to perform, we are firmly of the opinion that the disciplinary authority cannot be said to have committed an error in imposing the punishment of removal from service upon the respondent, particularly when on earlier two occasions also

he had been found guilty of commission of misconduct and punished therefor. The High Court thus committed a manifest error in arriving at a finding that the respondent had unblemished record for 28 years. We are not sure whether the High Courts attention was drawn to the statements made in the counter-affidavit filed on behalf of the appellants herein before the Andhra Pradesh Administrative Tribunal which showed the contra but on the basis of the materials on record which was before the High Court such finding could not have been arrived at.

Furthermore, the punishment of removal from service is not imposed only in the case of fraud or defalcation of government funds but even where a misconduct is committed by a person who holds a position of trust and on whom society looks forward as a protector of law and in such cases punishment of removal from service cannot be said to be wholly disproportionate, and thus the same was not even violative of the doctrine of proportionality."

In **State of U.P. v. Sheo Shanker Lal Srivastava**[41], the Suprme Court held:

"It is now well settled that the High Court or the Tribunal in exercise of its power of judicial review would not normally interfere with the quantum of punishment. Doctrine of proportionality can be invoked only under certain situations. The High Court should be very slow in interfering with the quantum of punishment, unless it is found to be shocking to one's conscience."

In **North-Eastern Karnataka Rt. Corpn. v. Ashappa**[42], the Supreme Court ruled that punishment of dismissal from service on the ground of continued absence from service by a bus conductor was justified. The relevant extract of that judgment is

reproduced below:

> "Remaining absent for a long time, in our opinion, cannot be said to be a minor misconduct. The appellant runs a fleet of buses. It is a statutory organisation. It has to provide public utility services. For running the buses, the service of the conductor is imperative. No employer running a fleet of buses can allow an employee to remain absent for a long time. The respondent had been given opportunities to resume his duties. Despite such notices, he remained absent. He was found not only to have remained absent for a period of more than three years, his leave records were seen and it was found that he remained unauthorisedly absent on several occasions. In this view of the matter, it cannot be said that the misconduct committed by the respondent herein has to be treated lightly.

In **General Manager, Appellate Authority, Bank of India v. Mohd.Nizamuddin**[43], the Supreme Court considered the question whether penalty of dismissal from service was warranted in the case of unauthorized absence from service and answered the same in affirmative. Some of the observations made in that case are extracted below:

> **"9.** It is now well-settled principle of law that the gravity of misconduct must necessarily be measured in terms of the nature of the misconduct. A bank officer holding the post of Middle Management Officer, Grade II which is a responsible post absented himself unauthorisedly for about three years which is undoubtedly detrimental to the public interest cannot be said to be not grave misconduct which would warrant dismissal from service. The High Courts view that the punishment of dismissal from service on the proved misconduct is disproportionate to the gravity of the misconduct, in our

> view, is fallacious. There can never be a more grave misconduct than a bank officer holding a responsible post absenting himself unauthorisedly for a period of three years detrimental to the public interest. That apart, despite the receipt of several notices issued to him he remained adamant and shied away from participating in the inquiry proceedings. This conduct is also unbecoming of a responsible officer holding the position as Middle Management Officer, Grade II.

By applying the ratio of the aforementioned judgments to the facts of this case, I hold that the punishment imposed on the petitioner is neither arbitrary nor shockingly disproportionate so as to warrant interference by the Court.

The question whether the appellate order suffers from the vice of being a non-speaking order deserves to be answered in negative. A reading of order dated 31.03.1993 makes it clear that after adverting to the substance of the charges levelled against the petitioner, the factum of his absence from duty for a long time and noticing the contentions raised by him, the Appellate Authority observed:

> "On my perusal of the records connected to the case placed before me I observe that the appellant was given all fair and reasonable opportunity to defend his case during the enquiry and the enquiry was held in accordance with the principles of natural justice. The appellant had approached the Court of Law to seek injunction granted by the Court was vacated and the appellant was issued a fresh order posting him to Meerut Main Branch. But the appellant failed to carry out the order on the ground of illness. The appellant made persistent effort to assign the reason of illness/sickness and failed to carry out the orders of the superiors. The appellant has admitted that he had gone to the branch personally to hand over the leave letter on 23-11-

1989 and thereby it is proved that the illness was not that serious so as to prevent him from proceedings to the transferee branch. The appellant went on corresponding with the bank with a view to avoid reporting for duty at the transferee branch by assigning the reason of ill-health and the continuous period of absence was not sanctioned as leave or accepted by the bank as absence on medical ground. Hence, the prolonged absence is treated as unauthorised. This warranted disciplinary action against the appellant. From the various correspondence/records available, it is evident that there was absolutely no inclination on the part of the appellant to report for duty at the transferee branch and he had concluded himself not to join for ever at the transferee branch. Hence, the Disciplinary Authority was constrained to award the punishment of removal from the services of the bank. I do not find any extenuating factors/grounds in the subject appeal to reconsider the decision of the Disciplinary Authority. Hence, while confirming the punishment of removal the services of the Bank with immediate effect which shall not be a disqualification for future employment awarded by the Disciplinary Authority for both the Articles of Charges vide his proceedings under reference, I dismiss the instant appeal preferred by Shri Triveni Prasad G.V."

The above extracted portion of the appellate order shows that the Appellate Authority has dismissed the appeal by assigning cogent reasons. Therefore, keeping in view the ratio of the judgment of the Constitution Bench in **S.N. Mukherjee v. Union of India**[44], the appellate order cannot be dubbed as non-speaking.

No other point has been argued.

In the result, the writ petition is dismissed.

G.S.SINGHVI, CJ

14.11.2006

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[1] AIR 1986 SC 1955
[2] 1995 Supp (4) SCC 169
[3] (1993) 4 SCC 357
[4] (2003) 4 SCC 104
[5] (2004) 4 SCC 245
[6] (2004) 12 SCC 299
[7] AIR 1963 SC 779
[8] AIR 1963 SC 1723
[9] AIR 1969 SC 966
[10] AIR 1965 SC 1103
[11] AIR 1975 SC 2151
[12] (1995) 6 SCC 749
[13] (1999) 1 SCC 759
[14] (1969) 3 SCC 392
[15] (1976) 3 SCC 574
[16] (1980) 3 SCC 304
[17] (1984) 1 SCC 43
[18] (1984) 3 SCC 295
[19] (1986) 3 SCC 229
[20] (1987) Suppl. SCC 518
[21] (1993) 4 SCC 727
[22] (1994) 4 SCC 422,
[23] (1996) 3 SCC 364,
[24] (1996) 6 SCC 415
[25] (1998) 6 SCC 651

[26] (1999) SCC (L&S) 620

[27] (2001) 6 SCC 392

[28] (2003) 11 SCC 734

[29] (2003) 3 SCC 443

[30] (2004) 1 SCC 281

[31] (2005) 2 SCC 237

[32] (1987) 4 SCC 611

[33] (1997) 7 SCC 463

[34] (2001) 2 SCC 386

[35] (1995) 6 SCC 749

[36] (2003) 3 SCC 605

[37] (2003) 4 SCC 331

[38] (2005) 7 SCC 338

[39] (2006) 1 SCC 589

[40] (2006) 3 SCC 173

[41] (2006) 3 SCC 276

[42] (2006) 5 SCC 137

[43] (2006) 7 SCC 410

[44] (1990) 4 SCC 594